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VIRGINIA & K. RY. CO. *v.* HENINGER.

Sept. 9, 1909.

[65 S. E. 495.]

**1. Contracts (§ 170\*)—Construction—Construction by Parties.**—Where the provision of an excavating contract, providing the method of measuring the material excavated, was ambiguous, the practical construction placed upon it by the parties was entitled to great consideration in construing the contract, especially where the commissioners found that the method contended for by defendant had never been used and was impracticable.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 170.\* 3 Va.-W. Va. Enc. Dig. 401.]

**2. Appeal and Error (§ 266\*)—Exceptions—Necessities—Report of Commissioners.**—Any error of the commissioners in failing to allow for shrinkage of earth in measuring fills, in an action upon an excavating contract, cannot be first urged on appeal, where the finding of the commissioners was not excepted to on that ground; such error not appearing on the face of the report.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1552-1571; Dec. Dig. § 266.\* 1 Va.-W. Va. Enc. Dig. 565; 11 id. 757.]

**3. Appeal and Error (§ 1022\*)—Findings of Commissioners—Conclusiveness—Approval by Court.**—Where it is not clear that the commissioners, whose finding was approved by the court, erred in allowing plaintiff solid rock prices, instead of earth prices, for removing certain material, the court on appeal will not disturb such finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.\* 11 Va.-W. Va. Enc. Dig. 757, et seq.]

**4. Contracts (§ 300\*)—Time of Performance—Extension.**—Changes in an excavation contract, which required more work to be done, made after the original contract was executed, necessarily gave the contractor the right to further time for its completion.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1379; Dec. Dig. § 300.\* 13 Va.-W. Va. Enc. Dig. 979.]

Judgment affirmed. All the judges concur.

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BROWN *v.* ORR.

Sept. 9, 1909.

[65 S. E. 499.]

**1. Partnership (§ 73\*)—Rights as to Third Persons—Lien.**—Where partnership funds were used to purchase and improve land conveyed

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\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.